90-331

No. -

In the Supreme Court of the United States

OCTOBER TERM, 1990

CORNING NATURAL GAS CORPORATION,
PETITIONER,
v.
NORTH PENN GAS COMPANY,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the constitutional due process standards for specific *in personam* jurisdiction permit Pennsylvania's "long arm" statute to reach petitioner Corning Natural Gas Corporation, a New York corporation purchasing natural gas at the New York State line from a Pennsylvania vendor, respondent North Penn Gas Company, an interstate natural gas pipeline corporation, pursuant to a non-franchise contract, particularly when petitioner Corning Gas has no property, no employees and no business activities within the forum state and where other business contacts between petitioner and respondent are tangential to the forum state.

2. Whether a court may apply the doctrine of pendent personal jurisdiction to subject nonresident defendants to the *in personam* jurisdiction of the forum state on a state cause of action which does not arise out of contacts with the forum state based only on a second state claim which does arise out of contact with the forum state.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner Corning Natural Gas Corporation ("petitioner") respectfully prays that a Writ of Certiorari issue to review the decree and opinion of the United States Court of Appeals for the Third Circuit entered in the above-entitled proceeding on March 5, 1990, and its Order denying rehearing, entered April 3, 1990.

OPINIONS BELOW

The March 5, 1990 opinion of the Court of Appeals for the Third Circuit is reported at 897 F.2d 687 and is reprinted in the appendix hereto, p. 3a.

The January 2, 1990 opinion of the Court of Appeals for the Third Circuit, now vacated, has not been reported. It is reprinted in the appendix hereto, p. 13a.

The opinion of the United States District Court for the Middle District of Pennsylvania (Kosik, J.) has not been reported. It is reprinted in the appendix hereto, p. 26a.

JURISDICTION

Respondent North Penn Gas Company ("respondent"), Plaintiff below, filed its Complaint in this action on July 19, 1988 in the Middle District of Pennsylvania. North Penn asserted diversity jurisdiction under 28 U.S.C. § 1332(a)(1) and *in personam* jurisdiction over Corning under the Pennsylvania "long arm" statute, 42 Pa. Con. Stat. Ann. §§ 5321 *et seq.* (Purdon 1981). On March 16, 1989, the District Court (Kosik, J.) granted petitioner's Motion to Dismiss for lack of *in personam* jurisdiction. See p. 34a.

On respondent's appeal, a three (3) judge panel of the Third Circuit Court of Appeals entered an Opinion and Order (Mansmann, J. dissenting) on January 2, 1990 which affirmed the District Court and held that under *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2147, 85 L. Ed.2d 528 (1985), the District Court did not have specific *in personam* jurisdiction over the petitioner. The Circuit Court stated that after evaluating the Corning-North Penn contract in light of *Burger King* it could not conclude that petitioner had the requisite minimum contacts with Pennsylvania.[1]

[1] January 2, 1990 Opinion by Nygaard, J., pp. 19-20a.

Respondent filed its Petition for Rehearing Before the Court In Banc on January 15, 1990. In accordance with Rule 40(a) Fed. R. App. P., petitioner filed no answer to the Petition for Rehearing nor did the Third Circuit request that petitioner file an answer. By Order dated February 22, 1990, the three (3) judge panel granted respondent's Petition for Rehearing and vacated the January 2, 1990 Order and Opinion. p. 12a. On March 5, 1990, without granting Corning an opportunity to answer and without oral argument, the panel reversed its January 2, 1990 decision and in a *per curiam* opinion, held that the District Court had specific *in personam* jurisdiction over the petitioner, because under the principles established in *Burger King*, petitioner had purposefully established minimum contacts in the forum state. p. 3a. Petitioner timely filed a Petition for Rehearing and Suggestion of Rehearing In Banc, which the Third Circuit denied by Order dated April 3, 1990. p. 1a.

The jurisdiction of this Court to review the decree of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

FEDERAL LAW INVOLVED

United States Constitution amend. XIV, 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

At issue in this case is whether petitioner is subject to specific *in personam* jurisdiction in Pennsylvania. Respondent does not contend that petitioner is subject to general *in personam* jurisdiction in Pennsylvania.

Petitioner, a New York corporation, is an intrastate gas distribution company with all of its retail and wholesale customers located in the State of New York. Petitioner's rates are subject to the jurisdiction of the New York Public Service Commission.[2]

The District Court found that petitioner owns no personal or real property, conducts no business, maintains no facilities or personnel in Pennsylvania, and that petitioner pays no taxes to Pennsylvania. The Third Circuit did not disturb these findings on review.

Respondent, a Pennsylvania corporation, entered into two separate contracts with petitioner in 1986. Neither contract bound the parties to long-term performance; both contracts were for one year terms with options to renew. Petitioner did not travel to Pennsylvania in connection with these contracts, and respondent states that petitioner made only one telephone call, of unspecified content, to the respondent and mailed the executed documents to respondent.

Pursuant to the first contract (the "Gas Sales Contract"), petitioner purchased natural gas from the respondent. The Gas Sales Contract contained no "choice of forum" or "choice of law" provision. Petitioner took both title and physical delivery

[2] Petitioner Corning Natural Gas Corporation has no parent companies or subsidiaries (exclusive of wholly owned subsidiaries) to list pursuant to United States Supreme Court Rule 29.1. Corning Gas is a small publicly-held corporation whose stock is traded in the over-the counter markets.

of the natural gas at the New York border.[3] Once the natural gas was delivered to petitioner, respondent exercised no control over the gas.

Under the second contract (the "Gas Storage Service Contract"), petitioner had the right, but not the obligation, to deliver natural gas to respondent for storage by respondent. Petitioner paid a minimum monthly fee for this right.

The Gas Storage Service Contract did not specify where respondent would store the natural gas should petitioner utilize such contract right. In response to inquiry by the Federal Energy Regulatory Commission ("FERC") as to the location for such potential storage, respondent unilaterally chose gas fields which it owned and operated in Pennsylvania. Respondent did not reserve any particular portion of the gas fields as "petitioner's space". Petitioner never owned any easement or property rights in the gas fields. Petitioner never exercised any of its rights under the Gas Storage Service Contract and never stored natural gas in Pennsylvania. The Gas Storage Service Contract specified that Pennsylvania law would control in any dispute, but did not contain a "choice of forum" clause.

Under date of October 20, 1986, petitioner terminated both contracts, giving rise to respondent's suit for breach of the two separate contracts. Respondent claims that petitioner's termination is ineffective and that petitioner is obligated to continue making future monthly payments to respondent.

In its Motion to Dismiss, petitioner asserted that it lacked sufficient contacts with Pennsylvania to subject it to specific

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[3] In its Order dated September 21, 1954, published at 13 FPC 1396, the Federal Power Commission ("FPC"), (now the Federal Energy Regulatory Commission) ("FERC"), found the petitioner to be exempt from the provisions of the Natural Gas Act, 15 U.S.C. §§ 717 *et seq.* pursuant to the so-called Hinshaw Amendment to the said Act., 15 U.S.C. § 717(c). By granting petitioner "Hinshaw" status, the FPC determined that petitioner received all its natural gas within or at the boundary of New York for ultimate consumption within New York. Both the District Court and the Third Circuit acknowledged the FPC's determination of Hinshaw status to petitioner.

in personam jurisdiction in Pennsylvania and that exercise of jurisdiction would violate constitutional due process principles. The District Court agreed, finding that petitioner took possession of all natural gas delivered to it by the respondent at the New York border, and never utilized the Gas Storage Service Contract. These facts, coupled with the fact that the petitioner neither owned or maintained any facilities, personnel, employees or property in Pennsylvania led the District Court to conclude that petitioner had not purposefully availed itself of the privilege of conducting activities in Pennsylvania and could not constitutionally be subject to suit in Pennsylvania.

On appeal by respondent, on January 2, 1990, a three (3) judge panel of the Third Circuit Court (Mansmann, J. dissenting) affirmed the District Court's Order. The Court held that although the Supreme Court in *Burger King* held that a single contract may, in certain cases, form the basis for *in personam* jurisdiction over a nonresident defendant, the facts in the present case were unlike those of the *Burger King* case.

The Third Circuit Court held that petitioner and respondent had entered into "short-term finite obligations that need not have been extended" and that a "structured, on-going relationship" was not created by the contracts between the parties. p. 19a. The Appeals Court duly noted the District Court's finding that the transfer of gas under the Gas Sales Contract took place at the New York state line, that no gas was stored in Pennsylvania, and that the "contracts were negotiated, with the exception of one phone call and the mailing of one package, entirely in New York". p. 19a. The Appeals Court concluded that petitioner had not purposefully availed itself of the privilege of conducting activities in Pennsylvania and was not subject to suit in Pennsylvania.

On January 15, 1990, respondent petitioned the Court for rehearing. On February 22, 1990, the three (3) judge panel of the Third Circuit granted respondent's Petition for Rehearing

without requesting or offering an opportunity for a response from petitioner. On March 5, 1990, petitioner, uncertain about the status of the case, by Federal Express mail, moved the Court of Appeals for leave to submit a brief in response to respondent's petition for rehearing. However, on March 5, 1990, the Court of Appeals, without requesting petitioner to answer respondent's Petition for Rehearing under Rule 40, Fed. R. App. P., reversed its earlier decision and held that petitioner was subject to specific *in personam* jurisdiction under the Pennsylvania "long arm" statute. Accordingly, the Court of Appeals vacated the District Court's Order and remanded the case for reinstatement of the respondent's Complaint.

In overruling its prior opinion, the Third Circuit panel held that under *Burger King*, petitioner's right to store gas with respondent, its past payments made by checks mailed to respondent, the correspondence from petitioner with the FERC in Washington, D.C. regarding the FERC's approval of the contractual agreements between the parties, and the existence of a history of past purchase contracts between the parties, showed that the petitioner "purposefully established minimum contacts with Pennsylvania" sufficient for "long arm" jurisdiction under Pennsylvania law. p. 9a.

The Third Circuit panel did not assign the alleged contacts by petitioner with Pennsylvania to any particular contract or cause of action to support the exercise of *in personam* jurisdiction, as is required where the authority of the court rests upon specific jurisdiction, as distinguished from general jurisdiction.

REASONS FOR GRANTING THE WRIT

I.

THE THIRD CIRCUIT'S DECISION (A) UNCONSTITUTIONALLY SUBJECTS PURCHASERS OF GOODS TO *IN PERSONAM* JURISDICTION UNDER A FORUM STATE'S "LONG ARM" STATUTE BASED SOLELY ON THE TANGENTIAL ECONOMIC IMPACT THAT PAYMENTS FOR OUT-OF-STATE PURCHASES HAVE ON THE FORUM STATE; AND (B) MISINTERPRETS *BURGER KING* AND CONFLICTS WITH DECISIONS OF THIS COURT AND THE CIRCUIT COURTS.

A. *The Third Circuit's Decision Unconstitutionally Subjects Purchasers of Goods to* In Personam *Jurisdiction Based Solely on the Tangential Economic Impact That Payments by Out-Of-State Purchasers Have on the Forum State.*

The Court of Appeals has held that petitioner has had four "contacts" with Pennsylvania which, in combination, subject petitioner to *in personam* jurisdiction in Pennsylvania on two causes of action, one for breach of the Gas Sales Contract and one for breach of the Gas Storage Service Contract. These contacts are: (1) petitioner's mailing of payments to respondent in Pennsylvania for its gas purchased in New York; (2) petitioner's correspondence with the FERC in Washington, D.C. regarding the FERC approval of the contracts; (3) petitioner's unutilized right to store gas with respondent for which it mailed payments to respondent in Pennsylvania; and (4) the existence of previous Gas Sales Contracts between the parties which both parties agree predate the formation of and were terminated prior to the Gas Sales Contract which is the subject of the respondent's suit.

Even if all of these "contacts" are treated as giving rise to respondent's causes of action on the theory that Pennsylvania

will suffer economic consequences as a result of respondent's loss of future payments, this is an insufficient basis upon which to subject petitioner, a simple buyer of goods and the right to service, to *in personam* jurisdiction in Pennsylvania.[4]

In *Dollar Savings Bank* v. *First Security Bank of Utah, N.A.*, 746 F.2d 208, 213 (3d Cir. 1984), the Court stated that: ". . . if incidental economic detriment as such furnishes a contact for jurisdictional purposes, then every monetary claim would per se furnish the predicate for personal jurisdiction over a nonresident debtor." This is clearly a result that the courts would wish to avoid. *See also Savin* v. *Ranier*, 898 F.2d 304 (2d Cir. 1990) (Designation of the forum state as the place of payment under the contract for the convenience of the forum resident does not subject the nonresident defendant to suit in the forum state); *Stuart* v. *Spademan*, 772 F.2d 1185, 1194 (5th Cir. 1985) ("The agreement to mail payment checks into the forum state does not weigh heavily in the calculus of contacts").

Thus, the Third Circuit's emphasis on the amount of money which petitioner mailed to the respondent in Pennsylvania cannot form the basis for subjecting the petitioner to *in personam*

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[4] Under *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 104 S. Ct. 1868, 80 L. Ed.2d 404, 413 (1984), specific jurisdiction may be asserted only when the cause of action arises from the defendant's forum-related activities and the defendant had sufficient contacts with the forum arising out of those activities. The four "contacts" which the Court of Appeals contends that petitioner had with Pennsylvania cannot form the basis for *in personam* jurisdiction over petitioner because respondent's causes of action do not arise out of such "contacts." Respondent claims that petitioner owes it money for continuing to provide petitioner with the right to purchase gas and to receive gas storage service (petitioner contends the contracts were terminated). Respondent's causes of action thus do not arise out of any communication which petitioner had with the FERC in Washington regarding the FERC approval of the contracts or out of prior sales contracts between the parties nor do petitioner's causes of action arise out of past payments to the respondent for its purchases of the natural gas or the right to have its natural gas stored by the respondent.

jurisdiction in Pennsylvania.[5] For this reason alone, the petitioner's Petition for Writ of Certiorari should be granted and the Third Circuit's Order reversed.

B. *The Third Circuit's Decision Misinterprets* Burger King *and Conflicts with Decisions of this Court and Circuit Courts.*

The Appeals Court's March 5, 1990 opinion is based upon a misinterpretation of the holding of the Supreme Court in *Burger King* and is in conflict with this Court's holding in *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 104 S. Ct. 1868, 80 L. Ed.2d 404 (1984); *Rosenberg Brothers & Co., Inc.* v. *Curtis Brown Co.*, 260 U.S. 516, 43 S. Ct. 170, 67 L. Ed 372 (1923), *U.S.S. Yachts, Inc.* v. *Ocean Yachts, Inc.*, 894 F.2d 9 (1st Cir. 1990); *Health Communications, Inc.* v. *Mariner Corp.*, 860 F.2d 460 (D.C. Cir. 1988); and *Stranahan Gear Co., Inc.* v. *N L Industries, Inc.*, 800 F.2d 53 (3d Cir. 1986).

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[5] The Appeals Court has likewise given undue significance to the impact on Pennsylvania of respondent's plan to store the natural gas in Pennsylvania. Petitioner did not select Pennsylvania as the site for the storage and thus it is a "fortuitous" contact. Although the Appeals Court stated that ". . . North Penn and Corning executed a written Gas Storage Agreement, in which North Penn agreed to store, in its Tioga County, Pennsylvania fields, excess natural gas which Corning planned to purchase from other suppliers," such statement is erroneous since the Gas Storage Service Contract (part of the record below) does not specify any location for the storage of gas. Petitioner received no easement or property rights from respondent. After petitioner made a routine filing with the FERC to advise the FERC that it had accepted respondent's form of storage service agreement, respondent supplied information unilaterally to the FERC as to where it would store the gas. Fortuitous contacts with a state by a nonresident defendant are insufficient to subject the defendant to suit in such state. *See Asahi Metal Industry Co.* v. *Superior Court*, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed.2d. 92 (1987) (contacts must be "purposeful"); *see also*, *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed.2d 490 (1980) (same); *Hanson* v. *Denckla*, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed.2d 1283 (1985) (same). Moreover, petitioner never stored gas in Pennsylvania.

1. The Court of Appeals Misinterpreted *Burger King*

Jurisdiction over the defendants was supported in *Burger King* because the parties' contract which gave rise to the lawsuit at issue set up a continuing *future* relationship between the parties by which the defendants, Michigan residents, agreed to subject themselves to the continuing scrutiny and control of the Florida-based franchisor, Burger King Corporation. *Burger King* does not justify a finding of *in personam* jurisdiction based on the fact that petitioner, a non-franchised purchaser of goods, dealing at arm's length with the seller respondent, made past payments to respondent or the fact that the parties had entered into past Gas Sales Contracts no longer in existence and not a basis for the present suit. The Court of Appeals has misinterpreted the *Burger King* Court's consideration of the planned prospective and on-going relationships between the contracting parties with the past, terminated relationships between the petitioner and respondent out of which the respondent's claims do not arise.

Moreover, critical factors present in the *Burger King* case, but not present in this case include: (a) Burger King Corporation was a franchisor and the defendants in that case were only two of thousands of franchise owners who sold to the public a unifying trade-name product and marketing scheme identified with the franchisor; (b) the contract between Burger King Corporation and its franchisees established a continuing and prospective long-term relationship between the parties in which the franchisor would control virtually every conceivable aspect of the franchise's operations and provide on-going training and assistance as well as advertising; (c) the franchisees contractually agreed to arbitrate certain disputes in Florida and contractually agreed that at least some cases could be commenced in Florida state courts.

Viewed in the context of a developing line of cases, *Burger King* presents a fact pattern in which the defendants became entwined with the plaintiff through a single contract which called for long-term control, scrutiny and involvement by the plaintiff and involved a mesning of the parties' identities due to the unique nature of the contractual relationship and the product produced through such business relationship. However, *Burger King* does not give assistance to courts struggling to deal with cases with far less compelling facts than those involving a unitary franchise arrangement. In the post-*Burger King* era, courts increasingly find nonresident defendants subject to specific *in personam* jurisdiction in the forum state, which leads to a question as to whether nonresident purchasers' due process rights are being eroded by misinterpretation of *Burger King*.[6]

The misinterpretation of *Burger King* and the existing conflicts between the Third Circuit's Order in this case and the various Supreme Court and Circuit Court cases suggests that new guidance from the Supreme Court on single contract spe-

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[6] *See, e.g., Papachristou* v. *Turbines Inc.*, 902 F.2d 690 (8th Cir. 1990), in which the Court in a 6-3 *en banc* decision, held that attempted delivery of goods to the forum state by a nonresident defendant was sufficient to subject the defendant to suit in the forum state even though the contract was not executed in the forum state nor were there any other contacts with the forum state. The *en banc* decision reversed the decision of an Eighth Circuit panel (reported at 884 F.2d 1116) finding that jurisdiction was lacking. In the January 2, 1990 opinion by Judge Nygaard, the Court of Appeals observed that prior to the Corning-North Penn case, the Third Circuit had considered only one post-*Burger King* case involving specific jurisdiction based on a contract. In the other case, *Associated Bus. Tel. Sys.* v. *Greater Capital Corp.*, 861 F.2d 793 (3d Cir. 1988), the Court found specific jurisdiction on a *Burger King* analysis where the only contact with the forum state was the defendant's entering into a long-term contract with a corporation located in the forum state and the resulting business activity of the plaintiff in that state from that contract. Such extension of specific jurisdiction would enlarge the concept of specific jurisdiction to substantially every interstate business transaction, particularly in light of the improving technology of the telecopier and the personal computer and their use in every day interstate business transactions.

cific jurisdiction in situations not involving franchise-like contracts is warranted.

2. The Court of Appeal's Order Conflicts With *Helicopteros* and *Rosenberg Bros. & Co., Inc.*

The Court of Appeals has ignored the mandate of the *Helicopteros* case that the plaintiff's causes of action against the nonresident defendant must arise out of the defendant's contacts with the forum state. As for the Gas Sales Contract, it is undisputed that petitioner purchased and took delivery of the natural gas at the New York border and that the Gas Sales Contract was neither executed nor performed in Pennsylvania. No choice of law or forum clause appears in the Gas Sales Contract. Thus, there are no "contacts" with the forum state which arise out of the Gas Sales Contract.

Likewise, respondent's cause of action as to the Gas Storage Service Contract relates to its contractual claims for payment of money to provide gas storage service to petitioner, not to past payments of money to respondent for such storage service nor out of petitioner's right to store gas with respondent. Respondent does not allege that petitioner's failure to store gas in Pennsylvania constitutes a breach of contract.

The Court of Appeals' Order also conflicts with *Rosenberg Bros. & Co., Inc.* This Court in *Helicopteros*, 460 U.S. at 418, n.12, 80 L. Ed.2d at 413 n.12, explained that the holding in *Rosenberg Bros. & Co., Inc.* is still undisturbed by *International Shoe Co.* v. *Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945) and the *Helicopteros* Court left undecided the issue of whether or not the mere purchase of goods in the forum state alone is a sufficient basis for specific jurisdiction. *A fortiori*, specific jurisdiction cannot be created where goods are delivered to a non-franchised purchaser at the state line of the forum state. Under *Rosenberg Bros. & Co., Inc.*, petition-

er's purchase and receipt of natural gas at the New York state line from a Pennsylvania interstate pipeline company cannot subject petitioner to suit in Pennsylvania. Furthermore, even if petitioner can be said to have purchased gas storage service from respondent, under *Rosenberg Bros. & Co., Inc.*, such purchase cannot subject petitioner to suit in Pennsylvania. Petitioner neither stored gas in Pennsylvania nor had any property rights in Pennsylvania and these facts foreclose the alternative argument that petitioner availed itself of the physical resources of Pennsylvania.

3. The Court of Appeals' Order Conflicts With Various Circuit Court Cases

The Court of Appeals Order conflicts with Circuit Court's decisions which have rejected *in personam* jurisdiction on facts involving contacts more substantial than in this case. For example, in *U.S.S. Yachts, Inc.*, a 1990 First Circuit case, a nonresident yacht manufacturer was sued in Puerto Rico for unjust cancellation of a dealership agreement. The First Circuit held there was no jurisdiction over the defendant even though the defendant had sent three letters to the plaintiff in Puerto Rico extending the dealership, granting commercial credit and then cancelling the dealership, even though the plaintiff, pursuant to the dealership agreement, was to have performed services in Puerto Rico.

In *Health Communications, Inc.*, a 1988 D.C. Circuit case, plaintiff sued for breach of contract, claiming it had provided alcohol abuse prevention training to the nonresident defendant's employees for which it had not been paid. The Court held that the defendant lacked the minimum contacts with the District of Columbia necessary to subject it to suit there even though the plaintiff was a corporation chartered by and located in the District of Columbia and the defendant's employees'

exams were graded and the procedures manuals prepared in the District of Columbia.

In *Stranahan Gear Co., Inc.*, a 1986 Third Circuit case, a nonresident purchaser of gear box assemblies was not subject to *in personam* jurisdiction in Pennsylvania on a contract claim by the manufacturer arising out of those purchases, even though the purchaser knew the parts would be manufactured in Pennsylvania and even though the purchaser had meetings in Pennsylvania with the manufacturer and distributor to discuss problems with the order.

II.

THE THIRD CIRCUIT'S DECISION UNCONSTITUTIONALLY APPLIES THE DOCTRINE OF "PENDENT PERSONAL JURISDICTION" TO SUBJECT NONRESIDENT DEFENDANTS TO THE *IN PERSONAM* JURISDICTION OF THE FORUM STATE ON A STATE CAUSE OF ACTION NOT ARISING OUT OF CONTACTS WITH THE FORUM STATE BASED ON A SECOND STATE CLAIM WHICH ARISES OUT OF CONTACTS WITH THE FORUM STATE

As noted previously, specific jurisdiction may be asserted only when the cause of action arises from the defendant's forum-related activities and the defendant had sufficient contacts with the forum arising out of those activities. *See*, *Helicopteros Nacionales de Colombia, S.A.* (holding that a nonresident corporation was not subject to a Texas Court's jurisdiction based on specific jurisdiction since the plaintiff's cause of action against the defendant did not arise out of the defendant's contacts with Texas).

Even assuming that the District Court may exercise personal jurisdiction over petitioner as to respondent's cause of action

based on the petitioner's alleged breach of the Gas Storage Service Contract (which petitioner denies), the District Court may not thereby exercise personal jurisdiction over petitioner as to respondent's separate and distinct cause of action based on the petitioner's alleged breach of a separate and distinct Gas Sales Contract. Each separate cause of action must be supported by facts sufficient to give the Court *in personam* jurisdiction. See, *Bowers* v. *NETI Technologies, Inc.*, 690 F. Supp. 349, 357 (E.D. Pa. 1988) (the doctrine of pendent personal jurisdiction does not authorize subjecting a defendant to *in personam* jurisdiction on a state claim based on the propriety of *in personam* jurisdiction over a second state claim). *But See Val Leasing, Inc.* v. *Hutson*, 674 F. Supp. 53 (D. Mass. 1987) (finding personal jurisdiction over the defendant on one state claim based on a second state claim). This Court has not addressed the issue. Likewise, this Court has not addressed, and the Circuit Courts are divided over, whether a federal court which obtains personal jurisdiction over a nonresident defendant pursuant to an extraterritorial service provision of a federal statute must have an independent basis of personal jurisdiction over the defendant with respect to pendent state claims. Cases finding pendent personal jurisdiction in this situation proper or improper are cited in *Oetiker* v. *Jurid Werke G.m.b.H.*, 556 F.2d, 1, 5 n.10 (D.C. Cir. 1977).

Respondent's cause of action for breach of the Gas Sales Contract does not arise out of any of the petitioner's alleged contacts with Pennsylvania. The District Court found that the Gas Sales Contract was neither executed nor performed in Pennsylvania and the Appeals Court did not disturb this finding upon review. All natural gas was delivered to petitioner at the New York border and title to the natural gas passed to petitioner at the New York border as well. Although the Appeals Court lists as "contacts" with Pennsylvania the fact that petitioner mailed past payments from New York to Pennsylvania and that the Gas Sales Contract provides that notices are to be sent

to Pennsylvania, such contacts are neither substantial contacts nor contacts out of which respondent's cause of action arises. As discussed previously, the mailing of payments to the forum state by a nonresident defendant is a mere whit and tittle, totally insufficient in itself to confer the forum state with jurisdiction over the defendant. *See Dollar Savings Bank* (holding that incidental economic impact does not furnish a sufficient contact for jurisdictional purposes).

The Appeals Court recognized that petitioner did not have sufficient contacts with Pennsylvania arising out of the Gas Sales Contract to subject petitioner to suit in Pennsylvania since the Court stated that "[t]he Storage Agreement between the two parties is crucial to the minimum contacts analysis." p. 9a.

Thus, the Court of Appeals in essence has held that a finding that personal jurisdiction exists over petitioner as to the cause of action for breach of the Gas Storage Service Contract means that *in personam* jurisdiction also exists over petitioner as to the cause of action for breach of the separate Gas Sales Contract.

By "lumping" together two causes of action arising from two separate contracts when undertaking its "minimum contacts" analysis, the Court of Appeals has created, without authority, (or at least improperly extended) "pendent personal jurisdiction". Under this theory of jurisdiction, it is conceivable that a nonresident defendant could be subjected to suit in Pennsylvania under a specific theory of jurisdiction not only for allegedly breaching a contract with a Pennsylvania resident where sufficient contacts with Pennsylvania relating to such contract exists, but also for an alleged assault and battery over a Pennsylvania resident while both persons were outside of Pennsylvania. Such a result would undermine the holding in *Helicopteros Nacionales de Colombia, S.A.*

For this reason alone, this Court should grant the Petition for Writ of Certiorari and reverse the Appeals Court decision, at least with respect to its holding that the District Court has *in personam* jurisdiction over the petitioner as to respondent's cause of action for breach of the Gas Sales Contract.

CONCLUSION

For these various reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5343

NORTH PENN GAS COMPANY,
Appellant

vs.

CORNING NATURAL GAS CORPORATION

SUR PETITION FOR REHEARING

Present: HIGGINBOTHAM, *Chief Judge*,
SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG,
HUTCHINSON, SCIRICA, COWEN, NYGAARD,
and ALDISERT *Circuit Judges*.

The petition for rehearing filed by appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Carol Los Mansmann
Circuit Judge

DATED: April 3, 1990

March 8, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5343

Re: North Penn Gas Company, Appellant vs.
Corning Natural Gas Corporation

Present: MANSMANN, NYGAARD and ALDISERT,
Circuit Judges

1. Petition by Corning Natural Gas Corp. for leave to submit an Answer to appellant's brief in support of appellant's petition for rehearing.

   For your information this Court's per curiam for publication opinion was filed March 5, 1990.

   Any answer to the above is due by March 15, 1990.

/s/ Carolyn Hicks
Deputy Clerk
Direct Dial 597-3143

ORDER

The foregoing Motion is denied.

By the Court,

/s/ Carol Los Mansmann
Circuit Judge

Dated: March 19, 1990

Filed March 5, 1990
FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5343

NORTH PENN GAS COMPANY,
Appellant,

vs.

CORNING NATURAL GAS CORPORATION

Appeal from the United States District
Court for the Middle District
of Pennsylvania
(D.C. Civil No. 88-1093)

ARGUED
September 7, 1989
Resubmitted on Petition for Panel Rehearing
January 29, 1990

Before: MANSMANN, NYGAARD, and ALDISERT,
Circuit Judges.

(Filed March 5, 1990)

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OPINION OF THE COURT

PER CURIAM.

North Penn Gas Company appealed from a final judgment of the United States District Court for the Middle District of Pennsylvania, dismissing North Penn's complaint against Corning Natural Gas Corporation pursuant to Fed. R. Civ. P. 12(b)(2) for lack of *in personam* jurisdiction. The overarching issue presented on appeal was whether the district court properly determined that Corning lacked sufficient minimun contacts with Pennsylvania to grant a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(2). In an unpublished opinion, a panel of our court, with one dissent, determined that North Penn had not shown "purposeful contact by Corning with Pennsylvania" and affirmed the district court's order of dismissal. We granted panel rehearing because, on review, we believe that the district court committed legal error by applying the "physical presence" test which is outmoded in light of the Supreme

Court's trend toward liberalizing minimum contacts theory. Accepting the facts as found by the district court and applying the standard of *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), we conclude that *in personam* jurisdiction exists. We, therefore, will vacate the district court's order and remand for reinstatement of North Penn's complaint.

I.

Determinative of our analysis is whether the facts presented by the plaintiff, when analyzed by the appropriate legal standards, establish the requisite minimum contacts between Corning and Pennsylvania to withstand a motion to dismiss for lack of *in personam* jurisdiction. A determination of minimum contacts is based upon findings of fact. As such, the district court's factual findings will not be disturbed unless clearly erroneous. *Stranahan Gear Co. v. N L Industries*, 800 F.2d 53, 56 (3d Cir. 1986). To the extent that the district court's conclusion relies upon the selection and application of legal precedent, our review is plenary. *Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145, 148 (3d Cir. 1988). *See also, Dent v. Cunningham*, 786 F.2d 173, 175 (3d Cir. 1986).

II.

The district court found that North Penn, a Pennsylvania corporation having its principal place of business in Pennsylvania, is a public utility engaged in the purchase, storage, and distribution of natural gas. Corning, a New York corporation having its principal place of business in New York, is a public utility providing gas services to the public in the State of New York. North Penn and Corning have had a continuing business relationship for over 30 years.

On September 4, 1986, Corning and North Penn executed a written Gas Sales Service Agreement ("Sales Agreement") in which North Penn agreed to supply natural gas to Corning

according to a fixed rate schedule. The Sales Agreement specified that the gas would be deemed to have been transferred at the New York-Pennsylvania border although North Penn asserts that actual transfer of the gas occurred within Pennsylvania.[1] Corning agreed to make minimum monthly payments, regardless of whether it actually purchased any gas. The agreement was to remain in effect for twelve months, with a renewal option. The Sales Agreement was silent as to which state's law would govern interpretation of the contract.

At the same time, North Penn and Corning executed a written Gas Storage Agreement, in which North Penn agreed to store, in its Tioga County, Pennsylvania fields, excess natural gas which Corning planned to purchase from other suppliers. This Storage Agreement also required Corning to pay a minimum monthly charge, regardless of whether any gas was actually stored by Corning. Similar to the Sales Agreement, the Storage Agreement was to remain in effect for twelve months, with a renewal option. Corning aggressively pursued regulatory approval of these contracts through its intervention and participation in North Penn's rate and certification proceedings before the FERC. Paragraph 6 of Article VI of the Storage Agreement specified that Pennsylvania law would govern contract interpretation and performance.

Both parties performed under the agreements for approximately ten months. Corning, however, asserts that it never stored any gas in Pennsylvania under the Storage Agreement, although it did make the minimum monthly *payments*. In fact,

[1] The district court found, by deferring to FERC's findings, that Corning is a Hinshaw Company, which took delivery of gas from North Penn at the New York-Pennsylvania border for resale to customers in New York. "Hinshaw Company" is a company exempted from federal regulation under the Hinshaw Amendment to the Federal Natural Gas Act. 15 U.S.C. § 717(c). To qualify for this exemption, a natural gas company must receive natural gas at or within the boundary of a state for ultimate consumption within that state and the rates must be subject to a state commission regulatory authority.

Corning submitted over 13 million dollars in payments to North Penn depositories in Pennsylvania for the services received under the Sales and Storage Service Agreements. We note further that both Agreements require that all *notices* to North Penn from Corning must be delivered to North Penn's principal business address in Pennsylvania.

North Penn filed this suit on July 19, 1988, alleging that Corning had never terminated the agreements and was, therefore, still liable for the minimum monthly charges under both agreements. Corning responded with a motion to dismiss under Fed. R. Civ. P. 12(b)(2) for lack of *in personam* jurisdiction. Once a defendant has properly raised a jurisdictional defense, the plaintiff must demonstrate sufficient contacts with the forum state to establish *in personam* jurisdiction. *Time Share Vacation Club v. Atlantic Resorts, Ltd.*, 735 F.2d 61 (3d Cir. 1981). The plaintiff must sustain its burden of proof through "sworn affidavits or other competent evidence." *Stranahan Gear Co.*, 800 F.2d 53, 58 (3d Cir. 1986) (quoting *Time Share, supra* at 67 n.9).

III.

Rule 4(e) of the Federal Rules of Civil Procedure authorizes a district court to assert personal jurisdiction over a non-resident to the extent permissible under the law of the state where the district court sits. The Pennsylvania Long Arm Statute states in relevant part:

> (b) Exercise of full constitutional power over non-residents.--In addition to the provisions of subsection (a) the jurisdiction of the tribunals of this Commonwealth shall extend to all persons who are not within the scope of section 5301 (relating to persons) to the fullest extent allowed under the Constitution of the United States and

> may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States.

42 Pa. Con. Stat. Ann § 5322(b) (Purdon 1981). The reach of this section is coextensive with the due process clause of the fourteenth amendment to the United States Constitution. *Time Share*, 735 F.2d at 63.

North Penn alleges that the district court has specific jurisdiction over Corning. Specific jurisdiction is invoked when the cause of action arises from the defendant's forum related activities. To establish specific jurisdiction a plaintiff must show that the defendant has minimum contacts with the state "such that [the defendant] should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). *Gehling v. St. George's School of Medicine, Ltd.*, 773 F.2d 539, 541 (3d Cir. 1985). No allegation of general jurisdiction has been made.[2]

In determining whether the district court has specific jurisdiction over Corning, "the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum state." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (quoting *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945)). *Burger King* clearly indicates when jurisdiction is proper.

> Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a "substantial connection" with the forum State. *McGee v. International Life Insurance Co.*, 355 U.S. 220,

[2] General jurisdiction is invoked when the plaintiff's cause of action arises from the defendant's non-forum related activities. In order to establish general jurisdiction, the plaintiff must show that the defendant "has maintained 'continuous and substantial' forum affiliations." *Reliance Steel Products v. Watson, Ess, Marshall & Enggas*, 675 F.2d 587, 588 (3d Cir. 1982).

> 223 (1957); *Kulko v. California Superior Court*, 436 U.S. 84, 94 n.7 (1978). Thus where the defendant 'deliberately' has engaged in significant activities within a State, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984), or has created 'continuing obligations' between himself and residents of the forum, *Travelers Health Assn. v. Virginia*, 339 U.S. 643, 648 (1950), he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by 'the benefits and protections' of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.

Id., at 475-76 (emphasis in original). *Burger King* reaffirms the "purposeful availment" requirement of *Hanson v. Denckla*, 357 U.S. 235 (1958) that there must be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State." *Id.* at 253.

The Storage Agreement between the two parties is crucial to the minimum contacts analysis. Corning readily admits that such an agreement existed but adamantly argues that it never stored gas in the North Penn storage fields, a fact North Penn concedes. The district court indicated this to be a decisive factor in determining that no *in personam* jurisdiction exists. We note, however, that Corning's actions caused North Penn to reserve adequate space to allow Corning the *right* to store gas at any time in that field. North Penn also avers that it has suffered economic injury within Pennsylvania as a result of Corning's breach. Thus the existence of the Storage Agreement, whereby Corning made consecutive payments to North Penn *into* Pennsylvania and reserved space in North Penn's storage fields *in* Pennsylvania, indicates sufficient minimum contacts by Corning with Pennsylvania to establish personal jurisdiction.

Corning's active interest in the FERC's tariff proceedings for North Penn arguably contributed to the creation of a valid contract between North Penn and Corning. The delivery of monies and communications into Pennsylvania by Corning were more than merely consequential. Such activities lend validity to a finding of a substantial connection by Corning to Pennsylvania, the forum state. Further, Corning and North Penn had an ongoing business relationship for over 30 years, entailing continuing obligations between the parties.

Finally, taking the district court's findings of fact as true that the delivery of gas occurred at the New York-Pennsylvania border, the absence of a "physical" presence by Corning is once again not determinative of a lack of *in personam* jurisdiction when accompanied by facts indicating a purposeful availment. The district court's reliance on a physical presence test to determine if it had jurisdiction over Corning is misplaced, since "[j]urisdiction . . . may not be avoided merely because the defendant did not *physically* enter the forum state." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (emphasis in original). The Supreme Court has thus deemed the physical presence test outmoded. This trend has continued support. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); *Pittsburgh Terminal Corp. v. Mid Allegheny Corp.*, 831 F.2d 522 (4th Cir. 1987); *Stuart v. Spademan*, 772 F.2d 1185 (5th Cir. 1985); *Health Communications, Inc. v. Mariner Corp.*, 860 F.2d 460 (D.C. Cir. 1988). *See also McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957).

IV.

It follows that Corning purposefully established minimum contacts with Pennsylvania through the services received under the Storage Agreement with North Penn, the 30 year relationship with North Penn, its voluntary participation in the continuation of that relationship (as shown through its intervention in

North Penn's rate and certification proceedings before the FERC), and the transmittal of payments into Pennsylvania. Such facts dictate a finding of *in personam* jurisdiction. The district court's order dismissing North Penn's complaint will, therefore, be vacated and remanded so that the complaint can be reinstated.

A TRUE COPY:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5343

NORTH PENN GAS COMPANY,
Appellant,

vs.

CORNING NATURAL GAS CORPORATION

Appeal from the United States District
Court for the Middle District
of Pennsylvania
(D.C. Civil No. 88-1093)

ARGUED
September 7, 1989
Resubmitted on Petition for Panel Rehearing
February 22, 1990

Before: MANSMANN, NYGAARD, and ALDISERT,
Circuit Judges.

ORDER

The petition for panel rehearing in the above is hereby granted and listed for submission under Rule 12(6). The opinion filed January 2, 1990, is hereby vacated.

BY THE COURT

/s/ Carol Los Mansmann
Circuit Judge

Dated: February 22, 1990

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5343

NORTH PENN GAS COMPANY,
Appellant,
v.
CORNING NATURAL GAS CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 88-1093)
District Judge: Hon. Edwin M. Kosik

Argued September 7, 1989
Before: MANSMANN, NYGAARD, and ALDISERT,
Circuit Judges.
(Opinion filed January 2, 1990)

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OPINION OF THE COURT

Nyggard, *Circuit Judge*

North Penn Gas Company ("North Penn") appeals from a final judgment of the United States District Court for the Middle District of Pennsylvania, dismissing North Penn's complaint against Corning Natural Gas Corporation ("Corning") pursuant to Fed. R. Civ. P. 12(b)(2) for lack of *in personam* jurisdiction. The sole issue on appeal is whether the district court properly determined that Corning lacked the requisite minimum contacts with Pennsylvania to subject it to suit there. Our review of this Fed. R. Civ. P. 12(b)(2) ruling is plenary as to the district court's selection and application of legal precedent, *Dent v. Cunningham*, 786 F.2d 173, 175 (3d Cir. 1986). We will affirm.

I.

Appellant North Penn is a Pennsylvania corporation having its principal place of business in Pennsylvania. North Penn is a public utility engaged in the purchase, storage, and distribution of natural gas. Appellee Corning is a New York corporation having its principal place of business in New York. Corning is a public utility providing gas services to the public in the State of New York. Corning owns no property and maintains no personnel in Pennsylvania. Because Corning is engaged solely in intrastate sales of natural gas, the Federal Energy Regulatory Commission has exempted Corning from compliance with federal regulations. North Penn and Corning have had a continuing business relationship for 30 years.

On September 4, 1986, Corning and North Penn executed a written Gas Sales Service Agreement ("Sales Agreement") in which North Penn agreed to supply natural gas to Corning according to a fixed rate schedule. The Sales Agreement specified

that the gas would be deemed transferred at the New York-Pennsylvania border. North Penn claims that actual transfer of the gas occurred in Pennsylvania. Corning agreed to make minimum monthly payments, regardless of whether Corning actually purchased any gas. The agreement was to remain in effect for twelve months, with a renewal option. The Sales Agreement was silent as to which state's law would govern interpretation of the contract.

At the same time, North Penn and Corning executed a written Gas Storage Agreement ("Storage Agreement"), in which North Penn agreed to store in its Pennsylvania fields excess natural gas which Corning planned to purchase from other suppliers. This Storage Agreement also required Corning to pay a minimum monthly charge, regardless of whether Corning actually stored any gas. Like the Sales Agreement, the Storage Agreement was to remain in effect for twelve months, with the option to renew. Paragraph 6 of Article VI of this contract specified that Pennsylvania law would govern contract interpretation and performance.

According to the affidavit of North Penn's treasurer, Edward L. McCusker, contacts initiated by Corning with Pennsylvania during negotiations consisted of one telephone call from Corning's Vice President for Finance, Kenneth Robinson, to McCusker and the mailing of the executed documents to North Penn's Pennsylvania offices. All face-to-face negotiation took place in New York and Corning employees never traveled to Pennsylvania.

Both parties performed under the agreements for approximately ten months. Corning never actually stored any gas in Pennsylvania under the Storage Agreement, although Corning did make the minimum monthly payments. Corning mailed or wired its payments to North Penn's bank in Pennsylvania. Corning terminated the Sales Agreement effective November 1, 1987. North Penn alleges that Corning never terminated the Storage Agreement.

II.

North Penn filed this suit on July 19, 1988, alleging that Corning was still liable for the minimum monthly charges under both agreements. Corning filed a motion for dismissal under Fed. R. Civ. P. 12(b)(2) for lack of *in personam* jurisdiction. Once a defendant has properly raised a jurisdictional defense, the plaintiff must demonstrate sufficient contacts with the forum state to establish *in personam* jurisdiction. *Time Share Vacation Club v. Atlantic Resorts, Ltd.*, 735 F.2d 61 (3d Cir. 1981). The plaintiff must sustain its burden of proof through "sworn affidavits or other competent evidence." *Stranahan Gear Co., Inc. v. NL Indus., Inc.*, 800 F.2d 53, 58 (3d Cir. 1986) (quoting *Time Share, supra* at 67 n.9).[1]

III.

Rule 4(e) of the Federal Rules of Civil Procedure authorizes a district court to assert personal jurisdiction over a non-resident to the extent permissible under the law of the state where the district court sits. The Pennsylvania Long Arm Statute states in relevant part:

> (b) Exercise of full constitutional power over non-residents. — In addition to the provisions of subsection (a) the jurisdiction of the tribunals of this Commonwealth shall extend to all persons who are not within the scope of section 5301 (relating to persons) to the fullest extent allowed under the Constitution of the

[1] The district court in this case considered the pleadings and affidavits in the light most favorable to the plaintiff. While other courts have adopted this standard, *see e.g. Turnock v. Cope*, 816 F.2d 332, 333 (7th Cir. 1981), *Hoffritz for Cutlery, Inc. v. Amajac*, 763 F.2d 55, 57 (2d Cir. 1985), there is no case in this circuit that clearly states an appropriate standard to apply when a Fed. R. Civ. P. 12(b)(2) motion is decided on the basis of conflicting affidavits alone. Indeed, the case law on the proper standard is murky at best. However, since neither party has argued that the district court applied the wrong standard as a matter of law, we need not consider this thorny issue.

> United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States.

42 Pa. Con. Stat. Ann § 5322(b) (Purdon 1981).

The reach of this section is coextensive with the due process clause of the fourteenth amendment to the United States Constitution. *Time Share Vacation Club v. Atlantic Resorts Ltd.*, 735 F.2d at 63.

North Penn alleges that the district court has specific jurisdiction over Corning. Specific jurisdiction is invoked when the cause of action arises from the defendant's forum related activities. To establish specific jurisdiction a plaintiff must show that the defendant has minimum contacts with the state "such that [the defendant] should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). *Gehling v. St. George's School of Medicine, Ltd.*, 773 F.2d 539, 541 (3d Cir. 1985). General jurisdiction is invoked when the plaintiff's cause of action arises from the defendant's non-forum related activities. In order to establish general jurisdiction, the plaintiff must show that the defendant "has maintained 'continuous and substantial' forum affiliations." *Reliance Steel Products v. Watson, Ess, Marshall & Enggas*, 675 F.2d 587, 588 (3d Cir. 1982). North Penn does not allege that the district court has general jurisdiction over Corning.

In determining whether the district court had specific jurisdiction over Corning, "the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum state."[2] *Burger King Corp. v. Rudzewicz*,

[2] Some language in the district court's opinion suggests that that court was applying a physical presence test to determine if it had jurisdiction over Corning. Reliance on such analysis is misplaced, since "[j]urisdiction . . . may not be avoided merely because the defendant did not *physically* enter the forum state." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

471 U.S. 462, 474 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). There must be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

In the commercial transaction setting, the Supreme Court has held that a single contract with a forum state resident may subject an out of state party to the jurisdiction of that state's courts in a dispute arising from that contract. In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), the Court held that a Florida district court's exercise of jurisdiction over a Michigan resident was constitutional where the Michigan resident had signed a long term franchise contract involving extensive contact with a Florida corporation. The Court cautioned, however, that a contract alone cannot "automatically establish sufficient minimum contacts in the other party's home forum." *Burger King*, 471 U.S. at 478. Courts instead must evaluate "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing . . . in determining whether the defendant purposefully established minimum contacts within the forum." *Id.*

This court has only considered one post-*Burger King* case involving specific jurisdiction based upon a contract. In *Associated Business Tel. Sys. v. Greater Capital Corp.*, 861 F.2d 793 (3d Cir. 1988), a New Jersey telephone company sued a California hotel seeking to recover amounts due for use of business phones or, alternatively, possession of the phone system. The court held that the New Jersey district court did have specific jurisdiction over the California hotel. The court based this conclusion on the fact that the phone contract between the two parties involved monitoring of the phone system from the New Jersey company's home offices and "created continuing obligations" between the parties for the duration of the contract's ten year term. *Associated Business Tel. Sys.*, 861 F.2d at 797.

IV.

Evaluating the Corning-North Penn contract in light of *Burger King*, we cannot conclude that Corning has the requisite minimum contacts with Pennsylvania. The franchise agreement in *Burger King* was "a carefully structured 20-year relationship that envisioned continuing and wide-reaching contacts with Burger King in Florida." *Burger King*, 471 U.S. at 478. The franchiser, Burger King, would retain control over virtually every aspect of the franchisee's production and marketing of food. Unlike the detailed franchise agreement in *Burger King* or the telephone service contract in *Associated Busines Tel. Sys.*, this case involves a basic sales contract and a rental contract. These contracts have relatively short terms, unlike the twenty year contractual relationship in *Burger King* and the ten year term in *Associated Business Tel. Sys.* The Corning-North Penn contracts did not create a structured, on-going relationship, but rather created short-term finite obligations that need not have been extended.

Looking to the terms of the agreements and the parties' actual course of dealing, we do not find that Corning purposefully availed itself of the privilege of conducting business in Pennsylvania. Although the Storage Agreement did contain a Pennsylvania choice of law provision, this is not determinative. *Burger King*, 471 U.S. at 480. The Sales Agreement by its terms specified that transfer of the gas would take place at the New York-Pennsylvania border, and, although gas would have been sent to Pennsylvania under the Storage Agreement, no gas was ever actually stored.

In addition, the Corning-North Penn contracts were negotiated, with the exception of one phone call and the mailing of one package, entirely in New York. This is unlike the franchise agreement in *Burger King*, which involved extensive contacts from the franchisees to Burger King's Miami offices.

Burger King, 471 U.S. at 467. Viewing the contract terms and the negotiation as a whole, Corning cannot be said to have "purposefully avail[ed] itself of the privilege of conducting activities" in Pennsylvania. *Hanson*, 357 U.S. at 253.

The additional facts cited by North Penn in support of its argument that Corning purposefully established contacts with Pennsylvania are not constitutionally sufficient to allow the assertion of jurisdiction. The mere mailing of payments by Corning to a Pennsylvania address does not confer jurisdiction. *Dollar Sav. Bank v. First Sec. Bank of Utah*, 746 F.2d 208, 214 (3d Cir. 1984). Nor does the fact that Corning sent a letter to the Federal Energy Regulatory Commission in Washington, D.C. on behalf of North Penn's tariff application constitute a contact with *Pennsylvania*. Finally, while the parties in this case had a long business relationship, North Penn does not cite any evidence that this relationship involved purposeful contact by Corning with Pennsylvania. Thus we will affirm the district court's dismissal of North Penn's complaint against Corning for lack of personal jurisdiction.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Nygaard, J.
Circuit Judge

North Penn Gas Company, Appellant v. Corning Natural Gas Corporation, No. 89-5343

/s/ _____
Carol Los Mansmann

Mansmann, *Circuit Judge*, dissenting.

I respectfully dissent because I believe that the district court committed legal error by applying the "physical presence" test which I consider to be outmoded in light of the Supreme Court's trend toward liberalizing minimum contacts theory. Accepting the facts as found by the district court and applying the standard of *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), I would conclude that *in personam* jurisdiction exists.

I.

The overarching issue presented on appeal is whether the district court properly determined that Corning lacked sufficient minimum contacts with Pennsylvania to grant a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(2). In order to analyze this issue properly, I believe the inquiry should focus on whether the facts presented by the plaintiff, when analyzed by the appropriate legal standards, establish the requisite minimum contacts between Corning and Pennsylvania to withstand a motion to dismiss for lack of *in personam* jurisdiction.

Normally a determination of minimum contacts is based upon findings of fact. Such findings would not normally be disturbed unless clearly erroneous. *Stranahan Gear Co., Inc. v. N L Industries, Inc.*, 800 F.2d 53, 56 (3d Cir. 1986). However, when a court's selection, interpretation, and application of legal precepts to the facts of the case are challenged on appeal, review is plenary. *Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145, 148 (3d Cir. 1988). *See also, Dent v. Cunningham*, 786 F.2d 173, 175 (3d Cir. 1986). North Penn has challenged the court's failure to interpret and apply the

relevant legal precepts. Therefore, our review in this instance is plenary. *Craig*, 843 F.2d at 148; *Dent*, 786 F.2d at 175.

II.

In its rationale, the district court found that Corning does not conduct business in Pennsylvania, owns no real or personal property in Pennsylvania, maintains no facilities or employees in Pennsylvania, pays no taxes to Pennsylvania and never utilized storage services offered by North Penn for storage of gas in Pennsylvania. The district court also found, by deferring to FERC's findings, that Corning is a Hinshaw Company,[1] which took delivery of gas from North Penn at the New York-Pennsylvania border for resale to customers in New York and that the Sales Service Agreement was not performed in Pennsylvania.

Certain additional undisputed facts which assist my analysis include the following: (1) Corning pursued the execution of Sales Service and Storage Service Agreements with North Penn. Indeed, a Storage Agreement between the parties had also been signed whereby Corning had purchased standby storage service from North Penn's storage fields located within Tioga County, Pennsylvania. Corning pursued regulatory approval of these contracts through its intervention and participation in North Penn's rate and certification proceedings before the FERC. (2) Corning submitted over 13 million dollars in payments to North Penn depositories in Pennsylvania for the services received under the Sales and Storage Service Agreements. (3) Both the Sales and Storage Agreements require that all notices to North Penn from Corning must be delivered to

[1] A "Hinshaw Company" is a company exempted from federal regulation under the Hinshaw Amendment to the Federal Natural Gas Act, 15 U.S.C. § 717(c). To qualify for this exemption, a natural gas company must receive natural gas at or within the boundary of a state for ultimate consumption within that state and the rates must be subject to a state commission regulatory authority.

North Penn's principal business address in Pennsylvania. (4) Corning and North Penn conducted business dealings for the past 30 years, albeit through separate contracts, without interruption. Absent any clearly erroneous findings, we will accept the district court's version of the facts as true. *Stranahan Gear Co., Inc. v. N L Industries, Inc.*, 800 F.2d 53, 56 (3d Cir. 1986).

III.

Although I concur with the majority's utilization of the minimum contacts analysis under *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) and the purposeful availment analysis under *Hanson v. Denckla*, 357 U.S. 235 (1958), I believe these standards were too narrowly applied to the facts.[2] The majority fails to consider the appropriate standard properly and instead places its reliance on a comparison between the specific facts of the contracts contained in *Burger King Corp.* and *Associated Business Tel. Sys. v. Greater Capital Corp.*, 861 F.2d 793 (3d Cir. 1988).

Burger King clearly indicates when jurisdiction is proper.

> Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a "substantial connection" with the forum State. *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957); *Kulko v. California Superior Court*, 436 U.S. 84, 94, n.7 (1978). Thus where the defendant 'deliberately' has engaged in significant activities within a State, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984), or has created 'continuing obligations' between himself and residents of the forum, *Travelers Health Assn. v. Virginia*, 339 U.S. 643, 648 (1950), he manifestly

[2] In a footnote, the majority chides the district court for relying on a physical presence test to determine jurisdiction and cites *Burger King Corp.* in support. I agree with the majority in this statement of the law.

> has availed himself of the privilege of conducting business there, and because his activities are shielded by 'the benefits and protections' of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.

Id., at 475-76 (emphasis in original).

The Storage Agreement between the two parties is crucial to the minimum contacts analysis. Corning readily admits that such an agreement existed. Nonetheless, Corning adamantly argues that no gas was ever stored by Corning in the North Penn storage fields. North Penn concedes this fact. The district court and the majority obviously believe this to be a decisive factor in determining that no *in personam* jurisdiction exists. However, I would contend that the existence of a Storage Agreement, whereby Corning made actual payments to North Penn *into* Pennsylvania and reserved space in North Penn's storage fields *in* Pennsylvania, reveals sufficient minimum contacts by Corning with Pennsylvania to establish personal jurisdiction. Corning's actions caused North Penn to reserve adequate space to allow Corning the *right* to store gas at any time in that field.

Corning's active interest in the FERC's tariff proceedings for North Penn arguably contributed to the creation of a valid contract between North Penn and Corning. The delivery of monies and communications into Pennsylvania by Corning were more than merely consequential. Such activities lend validity to a finding of a substantial connection by Corning to Pennsylvania, the forum state. Further, Corning and North Penn had an ongoing business relationship for over 30 years, entailing continuing obligations between the parties. Corning thus purposefully availed itself of the privilege of conducting business in Pennsylvania and thereby exposes itself to suit in Pennsylvania. *Id.*, at 476.

Additionally, taking the district court's findings of fact as true that the delivery of gas occurred at the New York-Pennsylvania border, the absence of a "physical" presence by Corning is not determinative of a lack of *in personam* jurisdiction when accompanied by facts indicating a purposeful availment by Corning. "Jurisdiction in [the aforementioned] circumstances may not be avoided merely because the defendant did not *physically* enter the forum State." *Id.* (emphasis in original). The Supreme Court has thus deemed the physical presence test outmoded. This trend has continued support. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); *Pittsburgh Terminal Corp. v. Mid Allegheny Corp.*, 831 F.2d 522 (4th Cir. 1987); *Stuart v. Spademan*, 772 F.2d 1185 (5th Cir. 1985); *Health Communications, Inc. v. Mariner Corp.*, 860 F.2d 460 (D.C. Cir. 1988); *Security Savings Bank, SLA v. Greentree Acceptance, Inc.*, 703 F.Supp. 350 (1989). *See also McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957).

It follows that Corning purposefully established minimum contacts with Pennsylvania through the services received under the Storage Agreement with North Penn, the 30 year relationship with North Penn, its voluntary participation in the continuation of that relationship (as shown through its intervention in North Penn's rate and certification proceedings before the FERC), and the transmittal of payments into Pennsylvania. Such facts dictate a finding of *in personam* jurisdiction. I would vacate and remand for trial.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

NORTH PENN GAS COMPANY Plaintiff	: :	
	:	CIVIL NO. 88-1093
vs.	:	(Judge Kosik)
	:	
CORNING NATURAL GAS CORPORATION Defendant	: : :	

MEMORANDUM

The plaintiff, North Penn Gas Company [hereinafter "North Penn"], filed this action on July 19, 1988 against the defendant Corning Natural Gas Corporation [hereinafter "Corning"]. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1332(a)(1).[1] On September 29, 1988, the defendant filed a motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(2) and (4), claiming that this court lacked jurisdiction over its person and that the service of process was insufficient. The defendant's motion to dismiss has been briefed. Additionally, on January 3, 1989, oral argument was heard on the defendant's motion. Therefore, the defendant's motion is ripe for disposition.

Defendant Corning maintains that the complaint fails to allege sufficient facts to establish that this court has personal jurisdiction over it. Specifically, the defendant states that the plaintiff does not allege that it [the defendant] is doing business in Penn-

[1] Plaintiff North Penn is incorporated in Pennsylvania and has its principal place of business in Pennsylvania. Defendant Corning is a New York corporation.

sylvania. The plaintiff contends that it has set forth facts to establish this court's *in personam* jurisdiction over the defendant under Pennsylvania's Long Arm Statute, 42 Pa. C.S.A. §§ 3301 *et seq*. In particular, the plaintiff argues that the defendant's contacts with Pennsylvania are substantial enough for this court to exercise specific personal jurisdiction over the defendant pursuant to 42 Pa. C.S.A. § 5322(b) without violating due process.

When a defendant raises a jurisdictional defense, the plaintiff bears the burden of demonstrating sufficient contacts with the forum state to give the court in *in personam* jurisdiction. *Time Share Vacation Club v. Atlantic Resorts, Inc.*, 735 F.2d 61, 63 (3d Cir. 1984); *Pharmaceutical Group Services, Inc. v. National Pharmacies, Inc.*, 592 F.Supp. 1247, 1248 (E.D. Pa. 1984). At the stage of the proceedings where the factual record consists of only pleadings and affidavits, the plaintiff 's burden is satisfied by establishing a *prima facie* case of jurisdiction. *Pharmaceutical Group Services Inc., supra,* at 1248 and n.1; *Kyle v. Continental Capital Corp.*, 575 F. Supp. 616, 618-20 (E. D. Pa. 1983). In reviewing a jurisdictional dispute, the pleadings and affidavits are to be considered in the light most favorable to the plaintiff, with any discrepancies in the versions of events resolved in the plaintiff 's favor. *Pharmaceutical Group Services, Inc., supra,* at 1248; *Cottrell v. Zisa,* 535 F.Supp. 59, 60 (E. D. Pa. 1982).

Rule 4(e) of the Federal Rules of Civil Procedure permits a district court to assert personal jurisdiction over a nonresident to the extent allowed under the law of the state where the district court sits. The Pennsylvania Long Arm Statute, 42 Pa. C.S.A. § 5322, states in relevant part:

> (a) General rule. — A tribunal of this Commonwealth may exercise personal jurisdiction over a person (or the personal representative of a deceased in-

dividual who would be subject to jurisdiction under this subsection if not deceased) who acts directly or by an agent, as to a cause of action or other matter arising from such person:

(1) Transacting any business in this Commonwealth. Without excluding other acts which may constitute transacting business in this Commonwealth, any of the following shall constitute transacting business for the purpose of this paragraph:

(i) The doing by any person in this Commonwealth of a series of similar acts for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object.

(ii) The doing of a single act in this Commonwealth for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object with the intention of initiating a series of such acts.

(iii) The shipping of merchandise directly or indirectly into or through this Commonwealth.

(iv) The engaging in any business or profession within this Commonwealth, whether or not such business requires license or approval by any government unit of this Commonwealth.

* * * * *

(2) Contracting to supply services or things in this Commonwealth.

(3) Causing harm or tortious injury by an act or omission in this Commonwealth.

> (4) Causing harm or tortious injury in this Commonwealth by an act or omission outside this Commonwealth.
>
> (b) Exercise of full constitutional power over non-residents. — In addition to the provisions of subsection (a) the jurisdiction of the tribunals of this Commonwealth shall extend to all persons who are not within the scope of section 5301 (relating to persons) to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States.

Under subsection (b), the reach of the Pennsylvania Long Arm Statute is coextensive with the Due Process Clause of the United States Constitution. *Time Share Vacation Club, supra,* at 63; *Bellante, Clauss, Miller & Partners v. Alireza*, 634 F. Supp. 519, 522 (M.D. Pa. 1985).

Section 5322(b) represents the greatest extent to which jurisdiction can be asserted over a non-resident defendant. Accordingly, because the court finds that the assertion of jurisdiction in this case does not comport with constitutional standards, it is unnecessary to determine whether jurisdiction is proper under any of the "specific act" sections of the Pennsylvania statute. *See* 42 Pa. C.S.A. § 5322(a). That is, even if proper under Pennsylvania law, the assertion of jurisdiction over the defendant must comport with federal constitutional standards.

Initially, the court must determine whether the claim being pursued against the defendant arises from defendant's forum related activities or from non-forum related activities. *See Reliance Steel Products Co. v. Watson, Ess, Marshall and Enggas*, 675 F.2d 587 (3d Cir. 1982). In this case, it is clear that any claim against the defendant arises out of the defendant's forum related activities. That is, the claim emanates from the same

activities upon which jurisdiction is based. Consequently, the court must determine whether the defendant has certain minimum contacts with this forum in order for this court to invoke specific jurisdiction over it.[2]

In other words, ". . . the defendant's conduct and connection with the forum state . . . [must be] such that he should reasonably anticipate being haled into court there." *See Gehling v. St. George's School of Medicine, Ltd.*, 773 F.2d 539, 541 (3d Cir. 1985) (citing *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). Under this analysis, the court must ask whether there are sufficient minimum contacts between the defendant and the forum state. *See Worldwide Volkswagen Corp. v. Woodson, supra*. The quality and nature of the defendant's activity must be such that it is reasonable and fair to require the defendant to conduct his defense in this state. *Kulko v. Superior Court of California*, 436 U.S. 84 (1978); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Finally, a non-resident defendant must have purposefully availed itself of the privilege of acting within the forum state. *Hanson v. Denckla*, 357 U.S. 235 (1958). In light of this analysis, the court must determine whether these constitutional standards are met in this case.

The affidavit of Edgar F. Lewis, Senior Vice President-Operations of defendant Corning, submitted with defendant Corning's reply brief demonstrates that Corning has no business

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[2] General jurisdiction exists when the claim does not arise out of or is unrelated to the defendant's contacts with the forum. The minimum contacts analysis is insufficient when the defendant's forum activities do not give rise to the claim. In invoking general jurisdiction, a plaintiff must demonstrate that the defendant maintained "continuous and substantial forum affiliations." *See Dollar Savings Bank v. First Security Bank of Utah, supra*. Thus, unless a defendant has continuous and systematic general business contacts with the forum state, the cause of action must arise from those activities within the state which would give rise to personal jurisdiction. *See Helicopteros Nacionales de Colombis, S.A. v. Hall*, 466 U.S. 408 (1984). The facts do not indicate, and plaintiff North Penn does not contend, that this court would have general jurisdiction over defendant Corning.

contacts with Pennsylvania.[3] Additionally, Corning owns no property, real or otherwise, located in Pennsylvania.[4] Rather, all property, real or otherwise, which is owned, maintained or constructed by Corning is located within New York.[5] Nor does Corning conduct business or maintain personnel within Pennsylvania.[6] Mr. Lewis also states that Corning took ownership of all natural gas purchased from North Penn at the New York State border.[7] Furthermore, Mr. Lewis avers that Corning does not now and has never utilized gas storage services offered by North Penn in Pennsylvania.[8] Finally, Mr. Lewis declares that no natural gas owned by Corning was stored at any time in Pennsylvania by North Penn.[9] According to the affidavit of Mr. Lewis based on personal knowledge, it is clear that Corning is not present in the Commonwealth of Pennsylvania.

Plaintiff North Penn argues that under the Sales Service Agreement between itself and Corning, Pennsylvania was the site of Corning's receipt of gas sales service. Thus, the plaintiff maintains that by agreeing to sales service within Pennsylvania, Corning has purposefully availed itself of the privilege of conducting activities within this forum. Plaintiff offered the affidavit of Kenneth C. Boal, Vice President of North Penn Gas, to the same effect. However, he speaks of points in Pennsylvania where the gas sold to Corning was metered by North Penn. We do not agree with the plaintiff. Under the Sales Service Agreement, Corning took possession of all gas purchased from North Penn at the New York state border.[10] Moreover,

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[3] *See* Exhibit "A" attached to defendant Corning's reply brief, Doc. 13.
[4] *Id.* at ¶ 4.
[5] *Id.*
[6] *Id.*
[7] *Id.* at ¶ 11.
[8] *Id.* at ¶ 12.
[9] *Id.*
[10] *See* Section 7 of the Sales Service Agreement, a copy of which is attached to the complaint, Doc. 1, and marked as Exhibit "A".

according to Mr. Lewis' affidavit, the parties intended that the transfer of the gas take place on the New York state border.[11] We further find that the Lawrenceville, Lindley and Addison interconnections are located at the New York-Pennsylvania state border as the defendant maintains.[12]

Additionally, we concur with the defendant that the parties did not intend that the delivery of gas from North Penn to Corning take place in Pennsylvania. Rather, based upon the Lewis affidavit and North Penn's admission attached as Exhibit "B" to said affidavit, it is apparent that the parties intended that the delivery of gas from North Penn to Corning occur at the New York border. In fact, Kenneth C. Boal, Vice President of North Penn, has testified that "Corning is a Hinshaw pipeline that formerly took delivery of gas from North Penn at the boarder [*sic*] between Pennsylvania and New York for resale or retail consumers and to wholesale purchasers."[13]

Moreover, the Federal Energy Regulatory Commission [hereinafter "FERC"] has found that Corning took delivery of gas from North Penn at the New York border. In his affidavit, Mr. Lewis states that "[i]n 1954 the FERC granted Corning's application for exemption from the provisions of the Natural Gas Act, finding that Corning purchased its natural gas from North Penn at points located within the State of New York, and that all of Corning's facilities were located within New York."[14] Attached to the Lewis affidavit is a copy of the FERC Order granting Corning's exemption from the Natural Gas Act, known as the Hinshaw exemption.[15] The FERC granted Corning a Hinshaw exemption because it found that Corning had no

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[11] *See* ¶'s 6-11 of the Lewis affidavit.

[12] *Id.* at ¶'s 7-9. *See also* the map attached to the Lewis affidavit, marked as Exhibit "B".

[13] *See* Boal's testimony attached to Doc. 18. *See also* Exhibit "B" attached to Doc. 13.

[14] *See* ¶ 5 of the Lewis affidavit.

[15] *See* Exhibit "A" attached to the Lewis affidavit.

physical presence within Pennsylvania. Specifically, the FERC found that all natural gas purchased by Corning is received at points located within New York and all of Corning's facilities are located within New York.[16] We agree with Corning that if it was found to receive the delivery of gas from North Penn in Pennsylvania as North Penn contends, then the FERC would not have granted it the Hinshaw exemption.

Finally, on January 3, 1989, this court granted North Penn the opportunity to present additional evidence on the jurisdiction issue in order to aid it in discharging its burden of establishing *in personam* jurisdiction over Corning. However, at the January 3, 1989 hearing, North Penn failed to present any new evidence which demonstrated that Corning has the presence within Pennsylvania necessary for this court to invoke personal jurisdiction over it. In fact, all evidence presented indicated that Corning has no physical presence in Pennsylvania. Corning has no pipeline within Pennsylvania; it pays no taxes to Pennsylvania; it does not perform any maintenance on any pipeline or meter station within Pennsylvania; it pays no employment tax to Pennsylvania; and it owns no property in Pennsylvania. Although the Storage Agreement provided that storage service was available to Corning in North Penn's Pennsylvania fields, the record is undisputed that at no time did Corning store gas at these fields in Pennsylvania. Thus, we find no merit to North Penn's argument based upon the situs of the storage services.

Based upon the foregoing, we find that Corning lacks sufficient minimum contacts with Pennsylvania to allow this court to exercise *in personam* jurisdiction over it. Accordingly, we shall grant Corning's Rule 12(b)(2) motion to dismiss.[17]

An appropriate Order will issue.

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[16] *Id.* at ¶ 3.

[17] Since we have found that we have no personal jurisdiction over Corning, we see no need to address Corning's Rule 12(b)(4) motion to dismiss.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

NORTH PENN GAS COMPANY Plaintiff	:	
	:	CIVIL No. 88-1093
vs.	:	(Judge Kosik)
CORNING NATURAL GAS CORPORATION Defendant	:	

ORDER

NOW this 16 day of March, 1989, IT IS HEREBY ORDERED THAT:

[1] the Rule 12(b)(2) motion to dismiss of defendant Corning Natural Gas Corporation is granted; and

[2] the Clerk of Court is directed to close this case.

/s/ Edwin M. Kosik
Edwin M. Kosik
United States District Judge

No. 90-33

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

CORNING NATURAL GAS CORPORATION,
Petitioner,

vs.

NORTH PENN GAS COMPANY,
Respondent.

On Petition For Writ of Certiorari To
The United States Court of Appeals
For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. May specific personal jurisdiction be exercised over an out-of-state corporation which has no physical presence in the forum state?

2. Did the Third Circuit "recognize" that specific personal jurisdiction could not exist over petitioner Corning Natural Gas Corporation with respect to the Sales Agreement between the parties?

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No. 90-33

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

CORNING NATURAL GAS CORPORATION,
Petitioner,

vs.

NORTH PENN GAS COMPANY,
Respondent.

On Petition For Writ of Certiorari To
The United States Court of Appeals
For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

STATEMENT OF THE CASE

Statement of the Facts

Respondent North Penn Gas Company (hereinafter "North Penn")[1] is an interstate natural gas pipeline

1. North Penn is a wholly-owned subsidiary of Penn Fuel Gas, Inc., a Pennsylvania business corporation.

company incorporated in the Commonwealth of Pennsylvania and engaged in the purchase, pipeline transmission, storage, and wholesale and retail sale of natural gas. Its principal offices are in Port Allegany, Pennsylvania. Its gas pipeline system is located in north central Pennsylvania, with portions in Tioga County, where the Company also has underground natural gas storage fields accessed by its pipelines. North Penn's interstate operations are subject to the jurisdiction of the Federal Energy Regulatory Commission (hereinafter "FERC"). Its intrastate operations are subject to the jurisdiction of the Pennsylvania Public Utility Commission.

Petitioner Corning Natural Gas Corporation (hereinafter "Corning") is a natural gas supplier with headquarters in the city of Corning, New York in Steuben County, which adjoins Pennsylvania's Tioga County. Corning purchases natural gas from interstate pipeline companies, including North Penn, to serve wholesale and retail customers in south central New York, including residential and commercial customers in municipalities within Steuben County and Chemung County, New York.

North Penn's pipelines and Corning's pipelines connect with each other near the Pennsylvania-New York border that runs between Tioga County, Pennsylvania and the Steuben and Chemung Counties of New York.

Before 1954, Corning was a subsidiary of North Penn. Under a succession of contracts from 1954 until immediately prior to the initiation of this suit, Corning was also North Penn's principal wholesale customer, accounting for between 87% to 95% of North Penn's yearly wholesale business. In each year from 1967 to 1987 for example, Corning purchased from $6.2 million to $42.2 million dollars in natural gas services from its neighbor North Penn. During the 30-year period of their relationship, Corning each month sent payments to North Penn's Pennsylvania depositories for natural gas services purchased from North Penn.

In August 1985 North Penn filed with the FERC revisions to its rate schedules for its wholesale contract customers, including Corning. Thereafter, Corning formally intervened in the FERC proceeding and requested that North Penn be required to amend its rate schedule filing in order to "unbundle" its services. This unbundling was to occur by North Penn establishing separate tariff rate schedules for natural gas storage service, transportation service and sales service, and by establishing separate storage service and transportation service agreements with Corning, as well as a revised gas Sales Agreement to supersede the existing agreement between Corning and North Penn.

Following negotiations with Corning, North Penn on June 6, 1986, by stipulation and agreement, acceded to the request for unbundling and supplemented its filing to include for FERC approval: separate storage service and transportation rate schedules, a revised sales service schedule and proposed Storage Service, Transportation Service and revised Sales Service Agreements with Corning. In its amended filing, North Penn specifically informed the FERC that it would be providing storage service to Corning by utilizing North Penn's storage fields in Tioga County, Pennsylvania. North Penn likewise included in this amended filing an application for a certificate of public convenience and necessity so that North Penn could provide Corning with the unbundled sales, storage, and transportation services Corning sought from North Penn under the agreements in question.

On July 3, 1986, FERC issued a notice of the filing of North Penn's aforementioned application. In the notice FERC stated that North Penn was to provide Corning with storage service of up to 5,000 Mcf per day or 500,000 Mcf per heating season. The notice specifically stated that the storage service would be provided to Corning from North Penn's storage facilities located in Tioga County, Pennsylvania.

On August 26, 1986, Corning, by its counsel, filed with the FERC a letter stating that, "Corning continues to strongly support the certificate application filed by North Penn and to *urge* its expeditious approval by the [Federal Energy Regulatory] Commission" (emphasis added). In the letter Corning's counsel also stated, "*As explained by Corning in two previous letters filed in this docket*, the proposed storage service (combined with the Transportation Service) would enable it to obtain lower priced, competitive supplies of natural gas from other sources" (emphasis added).

On September 4, 1986, Corning and its own principal whole sale customer, New York State Electric and Gas Corporation, filed a Joint Motion with the FERC supporting the North Penn filings and once more urging their *"expeditious"* approval.

Subject to FERC approval of the North Penn filings, Corning on September 4, 1986, also executed the revised Sales Agreement, the Storage Agreement, and the Transportation Agreement that were the subject of both the June 6, 1986 amended North Penn rate schedule filings and the June 6, 1986 North Penn certificate application before the FERC.

The signing of these Agreements was preceded by extensive negotiations between Corning and North Penn that concerned the terms and conditions thereof and that occurred during the period June 6, 1986 to September 4, 1986. The negotiations were conducted over telephone and by mail and included at least one call from Corning's Vice President directly to North Penn's Treasurer at its Pennsylvania offices. They culminated on September 5, 1986, with Corning's mailing of its executed copies of the Agreements to North Penn's Treasurer at its main Pennsylvania offices for final signature and for North Penn's subsequent submission of the Agreements to the FERC.

The FERC on December 12, 1986, issued an order which granted North Penn's request for a certificate of

public convenience to provide Corning with the storage service sought by it and with other natural gas services. The order identified the location of that storage service as North Penn's storage fields in Tioga County, Pennsylvania. Also on that day the FERC issued an order accepting for implementation the North Penn storage service rate schedule and revised sales service rate schedule.

Thereafter, North Penn provided natural gas storage service and pipeline gas sales service to Corning under the Agreements in question and pursuant to the FERC-issued December 12, 1986 certificate of public convenience.

Under the Storage Agreement and the FERC December 12, 1986 order issuing the certificate of public convenience, Corning had the right to store up to 5,000 Mcf of gas per day and 5,000,000 Mcf of gas per heating season in North Penn's Pennsylvania storage fields. Even if Corning stored no gas in those fields, under North Penn's FERC storage service rate schedule Corning was required to pay North Penn a minimum monthly charge for this storage right. North Penn was likewise required to stand ready to receive or withdraw gas from these Pennsylvania fields at Corning's request, up to the gas volumes in question.

In each month from January 1987 through October 1987 Corning made the minimum monthly payments required under the Storage Agreement to North Penn's depository in Pennsylvania. Thereafter, in breach of said agreement Corning ceased such payments. In its Complaint, North Penn contends that such payment obligation continues to this day.

The Storage Agreement required that the agreement be interpreted and enforced in accordance with the laws of Pennsylvania and that all notices, demands and requests by Corning be made in writing and sent to North Penn's corporate headquarters in Pennsylvania.

Under the Sales Agreement and its accompanying FERC rate schedule, Corning had the right to purchase 60,908 Mcf of natural gas per day and 7,900,000 Mcf of natural gas per year. In addition, Corning was required to pay North Penn a minimum monthly charge for the right to purchase these volumes on demand from North Penn. Like the Storage Agreement, the Sales Agreement also required that all notices from Corning be sent to North Penn's Pennsylvania address.

From January 1987 through October 1987 Corning, on a monthly basis, sent payments to North Penn's Pennsylvania depository on account of 4,029,110 Mcf in gas purchased by Corning and delivered to it through North Penn's Tioga County gas pipelines and on account of the minimum monthly demand charge required by the Sales Agreement.

After October 1987, Corning ceased making minimum payments to North Penn under the Sales Agreement and notified North Penn that it was terminating the agreement. North Penn's complaint asserts that Corning remains obligated to reimburse North Penn for sales service provided after that date.

During 1987, under the Storage and Sales Agreements Corning made in excess of $13,000,000 in monthly payments to North Penn's depositories in Pennsylvania, including over $3,000,000 in minimum monthly charge payments.

Procedural History

On July 19, 1988, North Penn filed a complaint against Corning in United States District Court for the Middle District of Pennsylvania asserting diversity jurisdiction under 28 U.S.C. §1332(a)(1).

In separate counts of its complaint, North Penn alleged that for the period November 1987 through June 1988 Corning owed it $171,141.86 in minimum monthly

storage charges and $2,272,279.15 in minimum monthly sales charges.

Corning filed a motion to dismiss pursuant to F.R.Civ.P. 12(b)(2) alleging lack of *in personam* jurisdiction over Corning under Pennsylvania's Long-Arm Statute, 42 Pa. C.S. §§3501 *et seq.* Following hearing and submission of affidavits and exhibits, the trial court in an unpublished March 16, 1989 memorandum opinion (Pet., pp. 26a-34a) granted the Corning motion. The trial court concluded that it lacked specific personal jurisdiction over Corning because "all evidence presented indicated that Corning has no physical presence in Pennsylvania" (Pet., p. 33a).

North Penn thereafter filed a notice of appeal with the U.S. Third Court of Appeals. Following argument before a three judge panel, the Court of Appeals on January 2, 1990 issued an unpublished opinion and order (Mannsman, J., dissenting) (Pet., pp. 13a-25a) affirming the lower court. North Penn thereupon filed a petition for rehearing. In the petition it pointed out factual errors made by the two judge majority in arriving at its opinion and directed the court's attention to minimum contacts between Corning and the forum which had been overlooked by the judges.

On February 22, 1990, the Court of Appeals granted North Penn's petition for rehearing and vacated its January 2, 1990 opinion (Pet., p. 12a). On March 5, 1990, the Court of Appeals issued a *per curiam* opinion and order reversing the trial court and remanding the matter for reinstatement of the complaint (Pet., pp. 3a-11a).

In its March 5, 1990 opinion, the Appeals Court concluded that the district court had erred in deciding the issue of specific personal jurisdiction based solely on Corning's lack of "physical presence" in Pennsylvania (Pet., p. 10a). The Court of Appeals further concluded that, in view of its several contacts with Pennsylvania under Storage and Sales Agreements, Corning had

established purposeful contacts with Pennsylvania as evidenced by Corning's aggressive pursuit of these Agreements before the FERC. Accordingly, the Court of Appeals concluded that specific personal jurisdiction did exist over Corning under the complaint (Pet., pp. 10a-11a).

Following the Court of Appeals' March 5, 1990 opinion and order, Corning thereupon filed a petition for rehearing, which was then denied by order of the Court of Appeals on April 3, 1990 (Pet., p. 1a). The instant petition for writ of certiorari followed.

SUMMARY OF REASONS FOR DENIAL OF PETITION

The Court of Appeals decision finding specific personal jurisdiction over Corning is consistent with this Court's ruling in *Burger King Corp. v. Rudzewicz,* 471 U.S. 462 (1985). The Court of Appeals applied the same minimum contacts test of specific personal jurisdiction as is recited in *Burger King* and other decisions of this Court.

Corning points to no decisions of this Court or of the other Circuit Courts which contradict the Court of Appeals in this matter. The two opinions of this Court which Corning cites as contradicting the Court of Appeals both concern general, as opposed to specific, jurisdiction. The allegedly contradicting Circuit Court decisions cited by Corning are clearly distinguishable on the facts from the instant matter. They reject specific personal jurisdiction in circumstances where the defendant resided far distant from the forum and had contacts with the forum that were significantly limited and/or that were initiated solely by the plaintiff.

Contrary to Corning's petition, *Burger King's* holdings are not limited to franchisor-franchisee relationships. It is therefore immaterial that the Court of Appeals' findings in favor of specific personal jurisdiction

over Corning did not in each and every respect mirror the findings of fact in *Burger King*.

Equally immaterial is Corning's assertion that its lack of an ongoing "physical presence" in the forum is fatal to specific personal jurisdiction. The Court of Appeals, repeating the holdings of this Court, correctly observed that "physical presence" is not a prerequisite for personal jurisdiction.

Corning asserts that the Court of Appeals' opinion in favor of specific personal jurisdiction is based *solely* on the economic impact, albeit substantial, that Corning's failure to make payments for North Penn services will have on the forum. This assertion is incorrect. The Appeals Court found specific personal jurisdiction based upon an entire complex of minimum contacts between Corning and Pennsylvania and not solely upon economic impact.

Notwithstanding Corning's claims, nowhere in its opinion does the Court of Appeals in *North Penn v. Corning* "recognize," conclude, or find that personal jurisdiction does not exist over Corning in regard to the Sales Agreement count of the complaint. The Appeals Court in reciting the minimum contacts between Corning and Pennsylvania cites minimum contacts existing under *both* the Storage and the Sales Agreement. Corning's claim that the court asserted mere "pendent jurisdiction" over Corning under the Sales Agreement count is belied by these minimum contacts found by the court.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Third Circuit's Conclusion That, if Minimum Contacts are Found, then Specific Personal Jurisdiction May Be Exercised over an Out-of-State Corporation which Lacks Physical Presence in the Forum State is Not Contrary to any Ruling of This Court or of the Other Circuit Courts.

A. Exercise of Specific Personal Jurisdiction Does Not Require that a Defendant Corporation Have an On-Going Physical Presence in the Forum State.

To support its petition, Corning avers that the Appeals Court erred in concluding that specific personal jurisdiction may be exercised over Corning in Pennsylvania even though "Corning has no property, no employees, and no business activities in the forum state" (Pet., Questions Presented).

This lack of Corning's on-going "physical presence" in Pennsylvania was the basis of the trial court's refusal to exercise specific personal jurisdiction over Corning (Pet., p. 33a). Nevertheless, the Third Circuit both in its vacated January 2, 1990 opinion (Pet., p. 17a, fn. 2; p. 23a, fn. 2) and in its final, March 5, 1990 opinion (Pet., p. 10a) criticized the trial court for relying on "physical presence" as its test of special personal jurisdiction. As the Appeals Court noted in its March 5, 1990 opinion, " '[j]urisdiction may not be avoided merely because the defendant did not *physically* enter the forum state.' *Burger King v. Rudzewicz,* 471 U.S. 462, 476 (1985)." (Pet., p. 10a).

In its petition to this Court, Corning directs us to no ruling of the Supreme Court or of the Circuit Courts of Appeals which holds that a defendant out-of-state corporation *must* have a "physical presence" in the forum in order, under the Due Process Clause, to be made subject to specific personal jurisdiction. There exists, in

fact, no such holding. Accordingly, Corning's petition should be denied.

B. The Third Circuit's Ruling That Specific Personal Jurisdiction Exists over Corning Is Not Based "Solely on the Tangential Economic Impact" of Corning's Gas Purchases, But Is Based on Corning's Complex of Minimum Contacts with Pennsylvania.

In support of its petition, Corning incorrectly asserts that the Court of Appeals' finding of specific personal jurisdiction over Corning is based "solely on the tangential economic impact that payments for out-of-state [natural gas] purchases have on the forum state" (Pet., p. 8). Not only does Corning here misstate a factor relied upon by the Court of Appeals to find jurisdiction, Corning materially mischaracterizes it as the *sole* factor.

When the Appeals Court determined that specific personal jurisdiction existed over Corning, it was not merely because of the economic impact of Corning's failure to make mandated payments into Pennsylvania. Rather, it was because of a *complex* of contacts which Corning had made with Pennsylvania and which related to the claims raised in the North Penn complaint. These contacts, the court found, satisfied the minimum contacts test of *Burger King Corp v. Rudzewicz,* 471 U.S. 462 (1985), *Hanson v. Denckla,* 357 U.S. 235 (1958), and decisions in that same line (Pet., pp. 8a-10a).

In detailing these minimum contacts, the Court of Appeals noted that the Storage Agreement entered into by Corning with North Penn specified that Pennsylvania law would govern (Pet., p. 6a), that both the Storage and Sales Agreements required Corning to deliver all notices to North Penn's principal business address in Pennsylvania (Pet., p. 7a), and that the situs of performance of the Storage Agreement was in Pennsylvania (Pet., p. 6a). The Appeals Court concluded that:

> "It follows that Corning purposefully established minimum contacts with Pennsylvania through the services received under the Storage Agreement with North Penn, the 30 year relationship with North Penn, its voluntary participation in the continuation of that relationship (as shown through its intervention in North Penn's rate and certification proceedings before the FERC), and the transmittal of payments into Pennsylvania. Such facts dictate a finding of *in personam* jurisdiction." (Pet., pp. 10a-11a)

Accordingly, the Third Circuit Court of Appeals clearly did *not* base its finding that specific personal jurisdiction exists over Corning *solely* on the economic impact (tangential or otherwise) that Corning's failure to make required reimbursement would have on Pennsylvania.

Moreover, in view of the Appeals Court's reliance on not one, but a complex of minimum contacts, it must also be concluded that the three Circuit Court opinions regarding "economic impact" that were cited by Corning (Petition, p. 9) fail to support Corning's argument that the Appeals Court erred in concluding that specific personal jurisdiction existed over Corning.[2]

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2. In the first opinion cited by Corning, *Dollar Savings Bank v. First Security Bank of Utah, N.A.*, 746 F.2d 208, 213 (3rd Cir. 1984), the Circuit Court rejected specific *in personam* jurisdiction when the defendant debtor's " *only* contacts are that the funds [borrowed] originated and were repaid in the forum state." (Emphasis added). In the second, *Savin v. Ranier,* 898 F.2d 304, 306-307 (2nd Cir. 1990), the court declined to find specific personal jurisdiction when that defendant debtor's *only* contacts with the forum state were that he executed a promissory note with a forum resident under which he was to make payments into the forum. In the third opinion cited by Corning, *Stuart v. Spademan,* 772 F.2d 1185, 1194 (5th Cir. 1985) the court held that, "[t]he *random* use of interstate commerce to negotiate and close a particular contact, the *isolated* shipment of goods to the forum at the *instigation* of the resident plaintiffs, and the mailing of payments to the forum do not constitute the minimum contacts necessary to constitutionally

In addition to vainly attempting to characterize the Court of Appeals' *North Penn v. Corning* decision as based solely on "economic impact," Corning questions the Appeals Court's conclusion that, under the Storage Agreement, Pennsylvania was the contemplated site of storage service (Pet., p. 10, fn. 5). Unfortunately for Corning, this is not only a finding of the Court of Appeals, but of the trial court as well, which found "... the Storage Agreement provided that storage service was available to Corning in North Penn's Pennsylvania fields" (Pet., p. 33a). As the Appeals Court noted (Pet., p. 5a), a district court's findings on appeal will not be disturbed unless clearly erroneous. *Stranahan Gear Co. v. N L Industries,* 800 F.2d 53, 56 (3d Cir. 1986). Corning failed to identify such clear error before the Court of Appeals and it has failed to identify such error here.

Lastly, it must be noted that Corning's implication that the gas sales it received from North Penn constituted "out-of-state purchases" (Pet., p. 8) is without foundation in either the findings of the trial court or the Court of Appeals. At best, both courts addressed the sales made by North Penn to Corning as involving delivery of gas "at the New York-Pennsylvania border" (Pet., p. 6a, fn. 1; p. 32a), but did not make any findings concerning where the point of purchase actually occurred.

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exercise jurisdiction...." (Emphasis added).

Thus, the *Dollar Savings, Savin,* and *Stuart* opinions are patently distinguishable on their facts from the Court of Appeals decision in this matter, focusing as these opinions do on payments sent into the forum state as the *sole* purposeful contact made by the defendant with the forum.

C. The Third Circuit's Decision Does Not Conflict with this Court's Holding in Burger King, Other Decisions of this Court, or of the Circuits

To support its assertion that the Court of Appeals' decision is in material conflict with *Burger King*, Corning argues that the rulings in *Burger King* are limited to franchisor-franchisee type contracts (Pet., p. 11). Moreover, Corning contends that because the contractual relationship between North Penn and Corning in the instant matter does not in all respects mirror the "unique" facts in *Burger King, Burger King* provides insufficient precedent for the Court of Appeals' ruling. (Pet., pp. 12-13).

Contrary to Corning's argument, *Burger King* nowhere holds that specific personal jurisdiction may exist only within the context a franchisor-franchisee relationship or only if all facts present in *Burger King* are repeated in the matter under consideration. The *Burger King Court* instead clearly states:

> "The Court long ago rejected the notion that personal jurisdiction might turn on *'mechanical' tests, International Shoe Co. v. Washington*, supra, at 319, 90 L Ed 95, 66 S Ct 154, 161 ALR 1057, or on 'conceptualistic ... theories of the place of contracting or of performance,' *Hoopeston Canning Co v. Cullen, supra,* at 316, 87 L Ed 777, 63 S Ct 602, 145 ALR 1113. Instead, we have emphasized the need for a 'highly realistic' approach that recognizes that a 'contract' is 'ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction.' *Id.,* at 316-317, 87 L Ed 777, 63 S Ct 602, 145 ALR 1113. It is these factors--prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing--that must be evaluated in determining whether the defendant

purposefully established minimum contacts within the forum." 471 U.S. at 479. (Emphasis added).

Despite Corning's assertions, it is the purposeful establishment of minimum contacts which the Appeals Court focused on rather than any fact-specific or totemistic test of personal jurisdiction (Pet., pp. 8a, 10a). In its analysis the Court of Appeals thus avoided the mechanical approach to determining jurisdiction that the *Burger King* Court cautioned against, but which approach Corning would clearly have the Court of Appeals use in order to decide jurisdiction.[3]

Besides allegedly being in conflict with *Burger King*, Corning also alleges that the Court of Appeals is in conflict with (Pet., p. 10) *Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984) and Rosenberg Brothers & Co. v. Curtis Brown Co.,* 260 U.S. 516 (1923). However, both these opinions concern the plaintiff's assertion of *general* jurisdiction over the defendant (jurisdiction not based upon defendant's forum contacts that are related to or arise from the claim in question). In view of this, no conflict between the Third Circuit decision in *North Penn* and this Court's *Helicopteros* and *Rosenberg* decisions may therefore be properly claimed to exist in order to support certiorari in this matter.

Corning also cites three Circuit opinions as allegedly conflicting with the *North Penn* Appeals Court decision (Pet., p. 10). The asserted conflict, however, is not explained by Corning and does not, in fact, exist. None

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3. Corning would have specific personal jurisdiction found only if in each case the fact-pattern in *Burger King* were exactly duplicated (Pet., p. 12, fn. 6). Unmentioned by Corning is that the facts in *Burger King* are less compelling than other cases where, unlike *Burger King,* the contract in question was to be performed (*and* was breached) in the forum state. *See e.g.,* the holding in *Papachristou v. Turbines Inc.,* 902 F.2d 685, 686-687 (8th Cir. 1990), which was cited by Corning as an alleged misinterpretation of *Burger King* (Pet., p. 12, fn. 6).

of the Circuit opinions cited by Corning are remotely on point with the facts in *North Penn.*[4] All are distinguishable by defendant contacts with the forum which either were extremely limited in scope and/or were totally initiated by the plaintiff. They are also distinguishable by the defendant's great geographic distance from the forum. Thus, the opinions can hardly be said to be in conflict with the Third Circuit's ruling in *North Penn*, which concerns a defendant who is headquartered in a county adjoining the forum and who "aggressively pursued" contacts with the forum (Pet., p. 6a), including an agreement by which it received the right to substantial underground storage service in facilities located within that forum.

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4. In the first Circuit opinion cited, *U.S.S. Yachts, Inc. v. Ocean Yachts, Inc.*, 894 F.2d 9, 12-13 (1st Cir. 1990), the court held that, in a suit between a *Puerto Rican* partnership and a *New Jersey* corporate defendant, jurisdiction *in Puerto Rico* would be too attenuated because it was founded only upon the sending of three letters by the New Jersey corporation to plaintiff in the forum. The second opinion Corning cites, *Health Communications, Inc. v, Mariner Corp.*, 860 F.2d 460 (D.C. Cir. 1988) ruled that a *Texas* hotel management company could not be subject to specific personal jurisdiction *in the District of Columbia* when its only contact with that forum was its contract with an employee training firm that provided all its training services at locations outside the forum, but which chose to grade the training results at its headquarters in the forum. The third allegedly conflicting opinion, *Stranahan Gear Co., Inc. v. N L Industries, Inc.*, 800 F.2d 53, 58-59 (3rd Cir. 1986), concerned a *Louisiana* ship builder which contracted with a *New Jersey* gear box manufacturer that subsequently subcontracted for parts with a *Pennsylvania* parts supplier. The Stranahan appeals court ruled that the *Louisiana* ship builder could not be subjected to a third-party suit *in Pennsylvania* by the New Jersey manufacturer when a claim of Pennsylvania jurisdiction was based merely upon the manufacturer's own choice of a Pennsylvania parts supplier as subcontractor and upon two visits to Pennsylvania by the third-party defendant Louisiana ship builder made solely at the behest of the New Jersey manufacturer.

II. The Court of Appeals Did Not Conclude, Find, or Recognize That Specific Personal Jurisdiction Could Not Exist over Corning with Respect to the Sales Agreement

In its final argument in favor of certiorari, Corning claims that the Appeals Court, by implication, improperly exercised pendent party jurisdiction over Corning in regard to the Gas Sales Agreement claim in the North Penn complaint (Pet., pp. 15-18).

As the sole premise for its argument Corning asserts that, even if *in personam* jurisdiction exists over it in Pennsylvania due to its Storage Agreement with North Penn, the Appeals Court "*recognized* that [Corning] did not have sufficient contacts with Pennsylvania arising out of the Gas Sales Contact to subject petitioner to suit in Pennsylvania" (emphasis added) (Pet., p. 17).

Notwithstanding Corning's assertion, the Appeals Court's decision contains *no* such conclusion, finding or "recognition" of insufficient contacts. Further belying the Corning assertion is the Appeals Court's listing of the minimum contacts that exist between Corning and Pennsylvania under *both* the Gas Storage and Gas Sales Agreements. These contacts include the mandate under both Agreements that all notices must be sent to North Penn's Pennsylvania address (Pet., p. 7a), the $13 million in monthly payments made under the Agreements by Corning to North Penn's Pennsylvania depositories (Pet., pp. 6a-7a), Corning's "aggressive" pursuit of regulatory approval of both Agreements (Pet., p. 6a), and Corning's 30 year business relationship with North Penn involving ongoing obligations (Pet., p. 10a).

Although, as Corning states (Pet., p. 17) the Court of Appeals found the Storage Agreement to be "crucial to the minimum contacts analysis" (Pet., p. 9a), the court in conducting such analysis did not either discount minimum contacts arising under the Sales Agreement or state any exclusive reliance on the Storage Agreement

as the basis for finding personal jurisdiction. Accordingly, Corning may not in good faith assert that the Appeals Court "recognized" that specific personal jurisdiction could not be asserted against Corning under the Sales Agreement count of the complaint.

Corning nevertheless asserts that, pursuant to the holding in *Bowers v. NETI Technologies, Inc.,* 690 F.Supp. 349, 357 (E.D. Pa. 1988), the Appeals Court in *North Penn v. Corning* violated the doctrine of pendent jurisdiction by "lumping" the Sales Agreement count of the complaint with the Storage Agreement count (Pet., p. 17).[5] Corning cites *Bowers* for the proposition that the doctrine of pendent personal jurisdiction does not authorize subjecting a defendant to personal jurisdiction on one state claim when such subjugation is based upon a finding of personal jurisdiction over the defendant in another state claim (Pet., p. 16).

Bowers, however, is not on point with *North Penn v. Corning.* In *Bowers*, the plaintiff brought two separate diversity suits against the same defendants. In the first suit the defendants had consented to jurisdiction over their person in the out-of-state forum and in the subsequent second suit they did not. Plaintiffs attempted to consolidate the two suits in the out-of-state forum. The forum court failed to find in the second suit that it had long-arm jurisdiction over the defendants and declined to exercise "pendent personal jurisdiction" over them based merely upon their consent to jurisdiction in the first suit. *Bowers, supra,* 690 F.Supp. at 356-358. In terms of fairness, this result can hardly be deemed

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5. Pendent jurisdiction is a discretionary power of the federal courts exercised where no diversity jurisdiction exists over additional defendants who, with the state claims against them, are sought to be joined in a pending suit brought by plaintiff. Pendent jurisdiction will be exercised when all claims, both original and pendent, involve the same nucleus of operative facts and joinder is dictated by reasons of convenience, fairness, and judicial economy. *See United Mine Workers v. Gibbs,* 383 U.S. 715 (1966).

surprising given that, absent the defendants' consent, long-arm personal jurisdiction over them even in the first suit would also not have been possible.

In its petition, Corning, in any event, immediately contradicts the holding in *Bowers* by citing the district court ruling *Val Leasing, Inc. v. Hutson,* 674 F.Supp. 53, 56 (D. Mass. 1987). This decision holds that where a plaintiff has established personal jurisdiction over a nonresident defendant under one state law cause of action, the forum court will exercise jurisdiction over that defendant with respect to other related state claims. *Id.* Uncited by Corning, but equally pertinent, is the holding in *Home Owners Funding Corp. of America v. Century Bank,* 695 F.Supp. 1343, 1345 (D. Mass. 1988), that, "The law is settled that, in a multicount complaint, if a court has personal jurisdiction over a [nonresident] defendant with respect to one count, it has personal jurisdiction over the defendant with respect to all counts." In view of *Val Leasing* and *Home Owners Funding Corp.,* the *Bowers* district court ruling stands as a ruling unique to the particular facts and equities of that case.

Whatever the alleged split among the district courts, Corning directs our attention to no split among the Circuit Courts of Appeals themselves on the question of whether a federal court, once it has found long-arm jurisdiction over a nonresident defendant under one state claim in a diversity complaint, may then assert personal jurisdiction over that defendant in regard to the remaining state claims in the complaint.[6]

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6. The split which Corning alleges to exist (Pet., p. 16) concerns the issue of whether, once jurisdiction over a foreign defendant is established under a plaintiff's *federal* claim, may personal jurisdiction be extended over the defendant as to the plaintiff's state claims. *Oetiker v. Jurid Werke G.m.b.H.,* 556 F.2d 1, 5 n.10 (D.C. 1977). Moreover, while the *Oetiker* opinion cited by Corning recognizes a split between those federal court decisions (and treastise authorities) which favor jurisdiction over state claims

Finally, it is significant that Corning makes no claim that being required to defend in Pennsylvania on *both* the Storage Agreement count *and* the Sales Agreement count would cause Corning inconvenience, would be unfair, or would not be in the interest of judicial economy. *Cf. United Mine Workers v. Gibbs,* 383 U.S. 715, 726 (1966). Corning likewise makes no assertion that the Storage Agreement count and the Sales Agreement count do not "arise from the same nucleus of facts" *Id.*

Notwithstanding the above-noted omissions by Corning, Corning's dire prediction that permitting the Third Circuit Court's decision in *North Penn v. Corning* to stand will undermine this Court's holding in *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408 (1984), must be viewed as fanciful, if not totally misplaced. *Helicopteros,* once again, is a general jurisdiction and *not* a special jurisdiction suit. Therefore, the considerations that prevail in the *Helicopteros* opinion concerning general personal jurisdiction will remain unaffected by the Third Circuit's minimum contacts findings in *North Penn v. Corning.*

NOTES *(Continued)*
in the described circumstance and the "older" district court decisions that disapprove of such jurisdiction, *Id.,* no split among the *Circuit Courts* themselves on even this particular issue is identified either in *Oetiker* or by Corning.

CONCLUSION

For the reasons stated above, respondent North Penn Gas Company respectfully requests that the petition for writ of certiorari of Corning Natural Gas Corporation be denied.

Respectfully submitted,

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